

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

W. R. Grace & Co. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Corporation Franchise Tax :
under Article 9A of the Tax Law
for the Year 1967. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 7th day of July, 1980, he served the within notice of Decision by certified mail upon W. R. Grace & Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

W. R. Grace & Co.
Grace Plaza
1114 Ave. of the Americas
New York, NY 10036

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
7th day of July, 1980.

Natasha A. Bank

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
W. R. Grace & Co. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Corporation Franchise Tax :
under Article 9A of the Tax Law
for the Year 1967. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 7th day of July, 1980, he served the within notice of Decision by certified mail upon Paul H. Frankel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

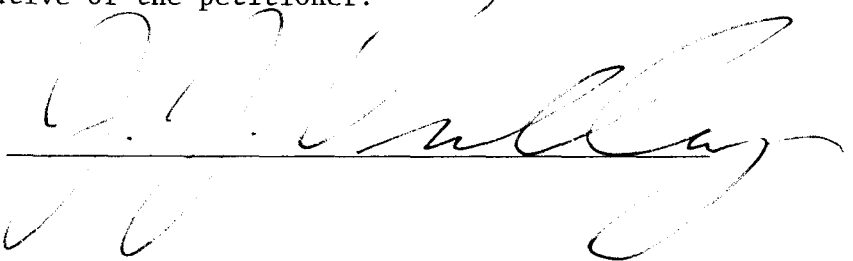
Mr. Paul H. Frankel
1114 Ave. of the Americas, 44th Fl.
New York, NY 10036

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
7th day of July, 1980.

Dorothea Bank



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 7, 1980

W. R. Grace & Co.
Grace Plaza
1114 Ave. of the Americas
New York, NY 10036

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Paul H. Frankel
1114 Ave. of the Americas, 44th Fl.
New York, NY 10036
Taxing Bureau's Representative

STATE TAX COMMISSION

DECISION

II. In the event that it should be determined that the said investment allocation percentage did not properly reflect the activity, business, income or capital of Panagra in New York, whether the Tax Commission, in its discretion should adjust it as provided by section 210.8 of the Tax Law and, if so, the character and extent of the adjustment.

FINDINGS OF FACT

1. Petitioner, W. R. Grace & Co., (hereinafter referred to as "Grace") was incorporated in Connecticut on June 20, 1899. It began doing business in New York on December 10, 1899.

2. During 1967, Grace's principal business activity was chemical manufacturing. It conducted that business in virtually every state of the United States. It also owned stock interests in a few other corporations as investments.

3. On October 15, 1968, Grace filed a 1967 New York State Corporation Franchise Tax Report with the Corporation Tax Bureau which reported a \$509,315 liability as follows:

<u>Tax on</u>	
Capital	\$ 3,253
Business Income	26,085
New York Investment Income	<u>479,977</u>
	\$509,315

Grace's 1967 Subsidiary Allocation Percentage was 2.49%. Its 1967 Business Allocation Percentage was 5.56%.

4. On October 7, 1971, Grace filed with the Corporation Tax Bureau a Claim for Refund of \$434,012 for 1967 on two grounds: (i) that in the return's computation of the Investment Allocation Percentage, book values had erroneously been used instead of fair market values; and (ii) that:

"Application of the statutory investment allocation percentage does not effect a fair and proper allocation of investment income. That percentage is attributable principally to capital stock of the Marine Midland Corporation which is allocated 100% to New York and which accounts for 94% of total New York investment capital (\$23,788M divided by \$25,271M). That stock was acquired in 1965 as the result of the liquidation of Grace's investment in the Grace National Bank, a subsidiary corporation.

Investment income (\$19,942,534) is attributable principally to the gain (\$14,322,738) on sale of Grace's 50% interest in capital stock of Pan American Grace Airways, Inc. That corporation, in

which Grace acquired its 50% interest in 1929, engaged in air transportation solely outside the United States and had a New York allocation percentage of zero.

It is submitted that the extraordinary and inequitable effect of the statutory investment allocation percentage should be adjusted by excluding the assets and income applicable to the investments in Marine Midland Corporation and Pan American Grace Airways, Inc. in accordance with sec. 210.8 of the law."

5. On February 1, 1974 the Corporation Tax Bureau sent Grace a notice of partial disallowance (a partial refund was granted on the valuation question) which (I) specifically denied the sec. 210.8 adjustment requested in ground (ii) of the Claim and (II) reduced (a) the total tax to \$304,238 and (b) the tax on New York Investment Income to \$264,229 and (III) changed the subsidiary and business allocation percentages as hereafter stated.

Said notice, dated February 1, 1974, stated, in part, that Grace's claim for refund "was reduced by denying your request to allocate the capital gain in the sale of your holdings in Pan American-Grace Airways by zero percent in lieu of the statutory investment allocation percentage".

6. On December 17, 1975 Grace filed with the Corporation Tax Bureau a Petition for Refund of \$228,521, plus interest, for 1967.

7. The valuation determination stated in the aforesaid notice, dated February 1, 1974, caused Grace's 1967 Consolidated Investment Income and its 1967 Investment Allocation percentage to be as follows:

1967 Consolidated Investment Income

Dividends from Marine Midland Corporation	\$ 762,867
Gain on the sale of stock of Pan American -	
Grace Airways, Inc. ("Panagra")	14,322,738
Other (decreased in notice by \$341,125)	<u>5,373,550</u>
	\$20,459,155

Investment Allocation Percentage

<u>Investment</u>	<u>Issuer's N.Y. Allocation Percentage</u>	<u>Total Value</u>	<u>Allocated N.Y. Value</u>
Marine Midland Corporation	100%	\$ 23,788,000	\$23,788,000
The Ruberoid Company	9.80%	11,992,000	1,176,000
Singer Credit Corp.	9.48%	1,748,000	166,000
J.C. Penny Co.	5.63%	2,498,000	141,000
Panagra	Zero	781,000 ⁽¹⁾	None
Others	Zero	<u>66,997,000</u>	<u>None</u>
		\$107,804,000	\$25,271,000

Investment Allocation Percentage (\$25,271,000 divided by \$107,804,000)
23.48%⁽²⁾.

7. At all times relevant, Marine Midland Corporation was a New York bank.

Prior to 1965, Grace was the owner of the Grace National Bank.

During 1965 Grace consummated an agreement with Marine Midland Corporation, entered into by them during 1964, pursuant to which Grace sold to Marine Midland Corporation the assets of the Grace National Bank. As the consideration for its acquisition of ownership of said assets, Marine Midland Corporation delivered to Grace and Grace accepted shares of Marine Midland Corporation's preferred stock constituting eight percent of the total equity of Marine Midland Corporation. During 1967 Marine Midland Corporation had a 100% New York Allocation Percentage.

8. Panagra was incorporated in Delaware in 1929 for the purpose of engaging in air transportation of persons, property and mail over route between

(1) Petitioner owned Panagra stock for 19 days in 1967. Accordingly, $19/365 \times \$15,000,000 = \$781,000.00$.

(2) Although the parties stipulated that this percentage was 23.48%, it should be 23.44%.

the Panama Canal Zone and Buenos Aires, Argentina, via the countries of the west coast of South America and then across the Andes from Santiago, Chile, to Mandosa, Cordoba and Buenos Aires, Argentina. Pan American World Airways, Inc. and Grace each subscribed to 50% of the capital stock of \$1,000,000, i.e., each initially invested \$500,000.

Panagra operated under a certificate granted by the Civil Aeronautics Board as a U.S. Foreign flag carrier operating outside of the United States and was not registered to do business in New York State during 1967 or prior years.

Pan American World Airways, Inc. and Grace each owned fifty percent of the shares of common stock of Panagra, Grace held its Panagra stock as an investment until it sold the same in 1967 as hereafter stated.

Panagra's management was separate from and independent of Grace. It submitted no budget to Grace; none of Panagra's expenses were claimed as deductions by Grace in its New York returns; none of its payroll, property or receipts were included in the Grace returns to New York State for 1967 or prior years; Panagra's books and records were kept separate and apart from Grace's in Panagra's own office, which said office was transferred to New York in 1952 for convenience; and the relationship between Panagra and Grace was an arms-length relationship.

9. During 1967 Grace sold its Panagra shares for \$15,000,000. Its basis for those shares was \$677,262 and a gain of \$14,332,738 was thus realized. During 1967 Panagra had a zero N. Y. Allocation Percentage.

10. As a result of an audit made by the Corporation Tax Bureau for the period ended December 31, 1967, Grace's Subsidiary and Business Allocation percentages were changed to 3.214% and 6.148% respectively, and the tax on Capital and Business Income to \$4,712 and \$35,297, respectively.

11. During the course of the hearing held herein, the petitioner made a motion for leave to amend the petition by adding three alternative position paragraphs after paragraph 5 of the petition. Said application for leave to amend was consented to by Counsel for the Corporation Tax Bureau and was thereupon granted.

CONCLUSIONS OF LAW

A. At all times relevant Panagra was only engaged in air transportation between the Panama Canal and points in South America and its operations were wholly unrelated to the petitioner's New York business activities.

B. The interest of the petitioner in Panagra contributed to the worth and income of petitioner's entire enterprise.

C. In the particular circumstances of the present case, the investment allocation percentage of 23.48%⁽³⁾ applied to the capital gain realized by the petitioner in connection with the sale during 1967 of its 50% interest in the shares of common stock of Panagra, did not properly reflect the activity, business, income or capital of the petitioner in New York.

D. That the Corporation Tax Bureau is directed to recompute petitioner's investment allocation percentage by excluding the value of petitioner's investment in Panagra from the total value of its investments. The Bureau is also directed to exclude the gain on the sale of Panagra stock in determining entire net income.

E. Except as hereinabove expressly granted, the petition of W. R. Grace & Co., dated December 17, 1975, as amended by the motion for leave to amend, submitted and granted on August 25, 1977 is in all respects denied.

The Notice of Deficiency issued by the Corporation Tax Bureau dated

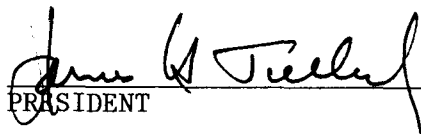
(3) Percentage was actually 23.44%. See footnote (2) supra.

February 1, 1974, is modified to the extent hereinabove expressly provided and in all other respects is sustained.

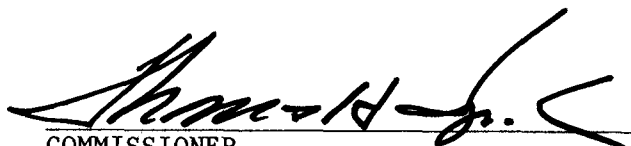
DATED: Albany, New York

STATE TAX COMMISSION

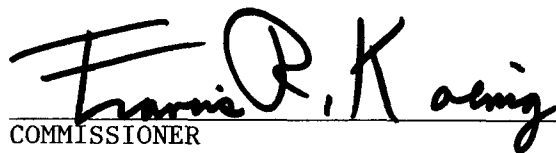
JUL 07 1980



PRESIDENT



COMMISSIONER



COMMISSIONER